NO. 49521-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Personal Restraint of

Marvis J. Knight,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

CATHERINE E. GLINSKI
Attorney for Petitioner

Glinski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Statutes

Rules

A. ISSUES PRESENTED

1. Where petitioner pled guilty to and was convicted of the nonexistent crime of "attempted manslaughter in the first degree," is the judgment and sentence invalid on its face, exempting petitioner's challenge from the one year time limit of RCW 10.73.090(1)?

2. Where Petitioner was convicted of a nonexistent crime and that conviction was necessary to the determination that he was a persistent offender, has he established actual and substantial prejudice that entitles him to relief?

B. STATEMENT OF THE CASE

On February 6, 1995, the Thurston County Prosecuting Attorney charged Petitioner Marvis Knight with assault in the first degree. CP 3; RCW 9A.36.011(1)(a). After a period of negotiations, Knight entered a guilty plea to one count of "attempted manslaughter in the first degree." CP 5-8; 1RP[1] 34-46, 56. The amended information alleged that Knight "took a substantial step toward recklessly causing the death of another person." CP 4-5. The statement on plea of guilty indicated that Knight had reviewed the police reports, statements, and evidence and believed that if the case proceeded to trial there was a high probability he would be

[1] The Verbatim Report of Proceedings is contained in two volumes, designated as follows: 1RP—4/3/95; 2RP—4/18/00.

found guilty of attempted manslaughter in the first degree. CP 7. The court imposed an exceptional sentence of 38 months on an agreed recommendation. CP 6, 10-15.

In 1999 Knight was convicted of two counts of second degree assault. Response to PRP, Appendix 1. In sentencing Knight, the court relied on Knight's 1995 conviction of "attempted manslaughter in the first degree" and a 1997 conviction of robbery in the second degree to conclude that Knight was a persistent offender. 2RP 30. It imposed a sentence of life without possibility of early release. Response to PRP, Appendix 1, at 5.

On June 22, 2016, Knight filed a motion to vacate the 1995 conviction and sentence. CP 16-115. He argued that the judgment and sentence was invalid on its face in that it imposed sentence for a nonexistent crime, that his plea must be withdrawn and the sentence vacated, and that relief was necessary because the attempted manslaughter conviction was counted as a strike for his current sentence as a persistent offender. *Id*. The Superior Court transferred Knight's motion to this Court as a personal restraint petition. CP 116. This Court determined that the issues Knight raises are not frivolous and appointed counsel to represent him.

C. ARGUMENT

THE JUDGMENT AND SENTENCE CONVICTING KNIGHT OF THE NONEXISTENT OFFENSE OF ATTEMPTED MANSLAUGHTER IS INVALID AND MUST BE VACATED AND HIS GUILTY PLEA WITHDRAWN.

An appellate court will grant appropriate relief to a petitioner who is under unlawful restraint. RAP 16.4. A petitioner is under restraint if the petitioner has limited freedom because of a court decision, the petitioner is confined or subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment and sentence in a criminal case. RAP 16.4(b). Restraint includes any stigma and burden from an unlawful conviction or invalid sentence. *Matter of Powell*, 92 Wn.2d 882, 887-88, 602 P.2d 711 (1979) (petitioner under restraint from unlawful conviction even though serving lawful concurrent sentence). Restraint is unlawful if any of the conditions set forth in RAP 16.4(c) is established, including that the conviction was obtained or sentence ordered in violation of the United States Constitution, Washington Constitution, or laws of the State of Washington. RAP 16.4(c)(2).

Knight is under unlawful restraint because he is incarcerated as a persistent offender on the basis of a conviction and sentence entered in violation of the state and federal constitutions and state laws. This Court should grant him relief by vacating his judgment and sentence and

withdrawing the guilty plea to the nonexistent crime of attempted manslaughter in the first degree.

1. **Knight's personal restraint petition is not time barred**.

Pursuant to RCW 10.73.090(1), "No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." This time limit does not apply to Knight's motion, because the 1995 judgment and sentence is not valid on its face. *See In re Personal Restraint of Thompson*, 141 Wn.2d 712, 715, 10 P.3d 380 (2000) (one year time limit does not apply to judgment and sentence that is invalid on its face). It imposes judgement and sentence for "attempted manslaughter in the first degree," which is a nonexistent crime. *State v. Red*, 105 Wn. App. 62, 66, 18 P.3d 615 (2001) (because manslaughter does not require a specific intent, there can be no attempted manslaughter), *review denied*, 145 Wn.2d 1036 (2002).

A judgment and sentence is invalid on its face if the trial court lacked statutory authority to impose a sentence. *In re Personal Restraint of Stockwell*, 179 Wn.2d 588, 593, 316 P.3d 1007 (2014); *In re Personal Restraint of Coats*, 173 Wn.2d 123, 144, 267 P.3d 324 (2011) (errors that

result from judge exceeding authority render judgment and sentence facially invalid). Such is the case when a defendant is convicted of a nonexistent crime. "Where a defendant is convicted of a nonexistent crime, the judgment and sentence is invalid on its face." *In re Personal Restraint of Hinton*, 152 Wn.2d 853, 857, 100 P.3d 801 (2004). *See also Thompson*, 141 Wn.2d at 719.

In *Hinton*, petitioners challenged their convictions for second degree felony murder based on assault, which was a nonexistent crime at the time the charged conduct was committed. *Hinton*, 152 Wn.2d at 857. The Supreme Court noted that related documents, such as charging documents and statements on guilty pleas, clearly showed that the petitioners were convicted of a nonexistent crime. Thus the judgments and sentences were facially invalid and the one year time limit did not apply to the petitioners. Id. at 858. *See also Thompson*, 141 Wn.2d at 716-19 (judgment and sentence invalid on its face because charged conduct occurred two years before the statute under which petitioner was convicted went into effect).

Here, as in *Hinton* and *Thompson*, the 1995 judgment and sentence is invalid on its face because Knight was convicted of a nonexistent crime. The invalidity is clearly shown by the judgment and sentence, as well as the amended information and statement on plea of guilty, all of which

identify Knight's offense as "attempted manslaughter in the first degree." CP 4, 5-8, 10-15. Because Knight's judgment and sentence is invalid on its face, his personal restraint petition is not subject to the one year time limit of RCW 10.73.090(1). *See Hinton*, 152 Wn.2d at 858.

2. **Knight has established actual and substantial prejudice.**

A personal restraint petitioner asserting constitutional error must establish that the asserted error has resulted in actual and substantial prejudice. *Hinton*, 152 Wn.2d at 858; *Stockwell*, 179 Wn.2d at 603. It is a fundamental violation of due process to convict and incarcerate a person for a crime without proof of all the elements of the crime. *Hinton*, 152 Wn.2d at 859 (citing *Fiore v. White,* 531 U.S. 225, 228-29, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001)). Where a person is convicted of a nonexistent crime, this necessary proof is missing, and due process is violated. *Hinton*, 152 Wn.2d at 860. Because Knight was convicted of nonexistent crime, he has shown fundamental constitutional error that actually and substantially prejudiced him. *See Id*. As the Supreme Court noted in *Hinton*, it has long been recognized that a judgment and sentence based on conviction of a nonexistent crime entitles the defendant to relief on collateral review. *Id*.

The fact that Knight entered an *Alford* plea as part of negotiated plea agreement does not change this result. *Hinton*, 152 Wn.2d at 860. The agreement to plead guilty to a nonexistent crime does not foreclose collateral relief, because a plea agreement cannot exceed the statutory authority of the court. *Id*. (citing *Thompson*, 141 Wn.2d at 723). One cannot, by way of negotiated plea agreement, agree to conviction of a nonexistent crime. *Id*. at 861.

In its response, the State argues that even though the 1995 judgment and sentence enters a conviction for a nonexistent crime, Knight is not entitled to relief because he pled guilty on a negotiated plea agreement. Response, at 9-10. The State relies on *State v. Majors*, 24 Wn. App. 481, 603 P.2d 1273 (1979), *aff'd*, 94 Wn.2d 354, 616 P.2d 1237 (1980), where the defendant agreed to be sentenced as a habitual offender without holding the State to its burden of proving prior convictions. But in *Majors* the appellant did not enter a plea to a nonexistent crime, and thus the court did not decide whether judgment and sentence on such a plea can be valid. The Supreme Court decided that issue in *Hinton* and *Thompson*, where it held that a negotiated guilty plea may be challenged on collateral attack where the court had no power to enter the conviction or impose the sentence, because one cannot agree to conviction of a

nonexistent crime. *Hinton*, 152 Wn.2d at 861; *Thompson*, 141 Wn.2d at 723.

The State also argues in its response to Knight's personal restraint petition that Knight has not established prejudice because he would have been sentenced as a persistent offender even without the attempted manslaughter conviction. Response, at 13. First, case law establishes that no other prejudice need be shown. Where the court exceeded its authority by sentencing for a crime that did not exist, the prejudice is obvious. *Hinton*, 152 Wn.2d at 860 ("Because [petitioners] have been convicted of nonexistent crimes, they have shown fundamental constitutional error that actually and substantially prejudiced them. The petitioners are entitled to relief."); *see also Coats*, 173 Wn.2d at 142 (prejudice is established where court exceeds authority by sentencing for nonexistent crime).

Second, the State is incorrect about Knight's persistent offender status. A persistent offender is an offender convicted of a most serious offense who has previously been "convicted as an offender" of a most serious offense on at least two separate occasions. RCW 9.94A.030(38). When Knight was sentenced as a persistent offender in 1999, the court relied on the attempted manslaughter conviction as a prior conviction of a most serious offense, in addition to the 1997 second degree robbery conviction. 2RP 30. There are no other most serious offense convictions

in Knight's criminal history. Response, Appendix 1, at 2. Knight has a prior juvenile adjudication for second degree assault, but that adjudication does not qualify as a strike, because a juvenile tried as a juvenile is not included in the definition of offender under the SRA. *State v. J.H.*, 96 Wn. App. 167, 177-78, 978 P.2d 1121 (1999); RCW 9.94A.030(35). Knight was not "convicted as an offender" of second degree assault, and therefore Knight's juvenile adjudication of second degree assault cannot be the basis of a persistent offender determination. Without the invalid conviction of attempted manslaughter, Knight had only one qualifying strike in his criminal history, and thus he could not lawfully be sentenced as a persistent offender.

Because Knight was convicted of a nonexistent crime, he has established fundamental constitutional error that actually and substantially prejudiced him. He is entitled to relief. *See Hinton*, 152 Wn.2d at 861.

D. CONCLUSION

Knight's timely petition established actual and substantial prejudice, and he is entitled to relief. The guilty plea to the nonexistent crime must be withdrawn and the judgment and sentence vacated.

DATED this 5th day of September 2017.

Respectfully submitted,

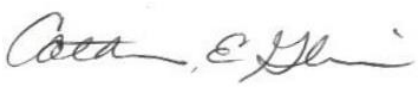
_____
CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed copies of the Supplemental Brief of Petitioner *In re the Personal Restraint Petition of Marvis J. Knight,* Cause No. 49521-0-II as follows:

Marvis J. Knight DOC# 734648
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
September 5, 2017

GLINSKI LAW FIRM PLLC

September 05, 2017 - 10:25 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	49521-0
Appellate Court Case Title:	Personal Restraint Petition of Marvis J. Knight
Superior Court Case Number:	95-1-00199-1

The following documents have been uploaded:

- 2-495210_Briefs_20170905102400D2840145_2929.pdf
  This File Contains:
  Briefs - Petitioners - Modifier: Supplemental
  The Original File Name was 49521-0 Knight Supplemental Brief.pdf

A copy of the uploaded files will be sent to:

- PAOAppeals@co.thurston.wa.us
- jacksoj@co.thurston.wa.us

Comments:

Sender Name: Catherine Glinski - Email: glinskilaw@wavecable.com
Address:
PO BOX 761
MANCHESTER, WA, 98353-0761
Phone: 360-876-2736

Note: The Filing Id is 20170905102400D2840145